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OGC Issues Roundtable

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OGC ISSUES ROUNDTABLE

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The Federal Communications Commission ("FCC" or the "Commission") has developed new regulations and policies which will affect Catholic dioceses, school districts and other Catholic entities in the areas of regulation of "indecent" speech, Instructional Television Fixed Service (ITFS), and cable television.

I. INDECENT SPEECH

In 1987, the FCC issued three decisions enforcing its policy of regulating the time, place and manner of broadcasting "indecent" programming on over-the-air (non-subscription) radio and television facilities. They are as follows:

a. In *Infinity Broadcasting Corp. of Pennsylvania*,[1] the FCC determined that references on a morning radio show to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality and menstruation, went beyond an occasional off-color reference, and instead dwelt on matters sexual and excretory.

b. In *Pacifica Foundation, Inc.*,[2] the FCC found to be indecent, portions of a play, broadcast as part of a weekly radio hour devoted to homosexual concerns, which depicted homosexual fantasies and contained language which explicitly described several occurrences of homosexual intercourse.

c. *In Regents of University of California*,[3] the FCC found that lyrics of a song, broadcast at 10 p.m., were indecent and not merely suggestive.

The text of these decisions reprint the actual language found to be indecent, and, while the language may be offensive, reading it is essential to understand the Commission's definition of indecency and to provide counsel to clients.

Indecent broadcasts were first defined, and regulated as to time,

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[1] 64 Rad. Reg. (P & F) ¶ 211 (F.C.C. Nov. 24, 1987) (order on reconsideration); 62 Rad. Reg. (P & F) ¶ 1202 (F.C.C. Apr. 16, 1987).

[2] 62 Rad. Reg. (P & F) ¶ 1191 (F.C.C. Apr. 16, 1987).

[3] 62 Rad. Reg. (P & F) ¶ 1199 (F.C.C. Apr. 16, 1987).

place, and manner by the Commission in 1975 in *FCC v. Pacifica Foundation.*[4] In *Pacifica*, a comedy monologue broadcast by an FM radio station was found by the Commission to be indecent, but not obscene, and broadcast licensees were deemed properly subject to time, place and manner regulation, but not absolute prohibition, as to when and how they may broadcast such language or visual depictions.[5]

The Commission's definition of indecency contains two parts; first, the content of the speech itself, and second, the nature of the audience, specifically, whether there is a reasonable risk that children are in the audience. Indecent speech, as broadcast, is defined as speech which describes or depicts sexual or excretory activities or organs in a manner which is patently offensive, as measured by contemporary community standards for the broadcast medium.[6]

In *Pacifica*, the Court specifically upheld the Commission's decision that a George Carlin comedy monologue, aired by a radio licensee at 2:00 p.m., was indecent within the meaning of 18 U.S.C. section 1464.[7] Further, the Court held that the Commission's imposition of sanctions on the licensee did not constitute improper censorship under the Communications Act.[8] The Court repeated and clarified in *Pacifica* its past holdings that broadcasters received a lower level of First Amendment protection than speakers using the print medium.[9] The Court stated that two of the reasons for this were relevant in *Pacifica*: the pervasive presence of the broadcast media, and its unique accessibility to children.[10] Children can turn on a television in their home, unassisted and unaccompanied by an adult. However, they could be barred from a bookstore or a movie theatre. In the areas of print and motion pictures, indecent material may be withheld from children without withholding it from adults. However, no similar distinction between adult and child viewers can be made with over-the-air television and radio broadcasts without absolutely barring adult access. Therefore, indecency, an area of speech which is separate from most others but still is not obscene, may be identified and restricted on the broadcast airwaves, even though the same restriction if applied to print material which is indecent but not obscene would raise "grave constitutional questions."[11] Thus, in the broadcast context, the Court has permitted the Commission to draw a distinction between obscene mate-

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[4] 438 U.S. 726 (1978).

[5] *Id.* at 748-50.

[6] *In re* Pacifica Found., 56 F.C.C.2d 94, 98 (1975).

[7] *Pacifica*, 438 U.S. at 738-41.

[8] *Id.* at 735-38.

[9] *Id.* at 748-50.

[10] *Id.*

[11] *Id.* at 741 n.17 (quoting Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946)).

rial[12] which is not constitutionally protected and indecent speech which enjoys qualified protection under the first amendment.

The Commission's recent decisions expand the definition of indecency beyond the facts of *Pacifica*, by examining the content and the context of the words at issue to determine if they are patently offensive under contemporary community standards as applied to the broadcast medium.

The Commission's recent decisions also expand upon the second element of indecency, the reasonable risk that children will be in the audience, by assuming that after midnight there is no such reasonable risk, so that broadcasters may air indecent programming after such hour.

The Court of Appeals for the District of Columbia Circuit recently remanded for further consideration by the Commission, the time restriction (midnight to six a.m.), asking the Commission to back up its time restrictions with audience data showing actual numbers of child viewers at various time periods. The court, however, upheld the Commission's definition of indecency, and its purpose, to shelter children by channeling indecent materials.

II. INSTRUCTIONAL TELEVISION FIXED SERVICE (ITFS)

The Commission recently has responded to the decision of the Court of Appeals for the District of Columbia Circuit which remanded for further consideration issues of broadcast classification and lottery procedures. The circuit court had overturned some of the Commission's latest regulations of Instructional Television Fixed Service (ITFS).[13] This ruling affected the Commission's recently issued guidelines which permit ITFS licensees to lease time periods on their channels to other entities which wish to transmit programing, but do not have nor want a license of their own. The District of Columbia Circuit held that the Commission failed to give adequate reasons for classifying non-subscription uses of excess capacity of ITFS channels as non-broadcasting (and thus not subject to such broadcast regulation as equal time for candidates requirements, or the public interest standard) and for deferring even an examination of the issue. The court indicated that an entity transmitting programming not aimed at a general audience is not a broadcaster:

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[12] *See* Pope v. Illinois, 481 U.S. 497 (1987); Miller v. California, 413 U.S. 15 (1973). Obscenity is defined as material which (a) the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest, (b) depicts or describes, in a patently offensive way, as judged by contemporary community standards, sexual conduct specifically defined by applicable law ("hardcore" activity), and (c) lacks serious literary, artistic, political, or scientific value, as determined by a reasonable person. *Id.* at 24.

[13] Telecommunications Research & Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988).

> Indisputably, ITFS that is used for its original purpose of providing educational programming is not broadcasting; transmissions with a precise educational purpose intended for use by a narrow group of students [do not meet the statutory definition of broadcasting, that is, they] are clearly not "dissemination of radio communications intended to be received by the public. . . ."[14]

The court also vacated the Commission's regulation which established a lottery system for selection of ITFS licensees which did not include either media diversity preferences (that is, extra weight given to an applicant with little or no ownership or controlling interest in other broadcast media) or minority ownership preferences, as mandated by Congress in 47 U.S.C. section 309(i). The court remanded both issues to the Commission for further consideration.

The Commission responded by determining that ITFS licensees shall be required to notify the Commission of proposed use or lease of excess capacity for non-ITFS services which may be offered on a non-subscription (over-the-air) basis. The Commission must approve such use before the licensee may allow a lessee to operate. The regulatory status of the lessee (or other user) which uses the excess capacity for non-ITFS purposes and does not scramble and charge customers a fee to receive its non-ITFS signals, will be determined by the Commission on a case-by-case basis.[15] The Commission cited to a footnote in its earlier decision regarding subscription television for examples of possible types of non-subscription offerings which it probably would not classify as broadcasting: portable telephones and network program feeds.

The question of the regulatory classification of an entity offering service on the excess capacity of an ITFS station on a subscription, scrambled basis was settled in a related FCC proceeding: *Subscription Video, Report and Order.*[16] In that case the District of Columbia Circuit upheld as reasonable the Commission's decision to classify as non-broadcast, subscription television or other programming services which are transmitted using techniques which prevent reception of the program by non-subscribers.[17] The Commission will follow this policy, and apply the factor of the subscription nature of the service to classify the use of excess ITFS capacity on a subscription basis as non-broadcast.

On the issue of preference, the Commission has proposed to add an additional criterion to be used to select a winner among comparative applicants which are otherwise indistinguishable: the applicant which pro-

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[14] *Id.* at 1354 (quoting 47 U.S.C. § 153(o) (1982)).

[15] MM Dkt. No. 83-523 (order released July 22, 1988).

[16] 2 F.C.C. Rcd. 1001 (1987), *aff'd*, National Ass'n for Better Broadcasting v. F.C.C., 849 F.2d 665, 670 (D.C. Cir. 1988).

[17] *See* National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 670 (D.C. Cir. 1988).

poses to serve the greater number of students will win. Public comment has been requested on this criterion, and the Commission should issue its order late this year.

The Commission's ITFS rules have undergone major changes since 1983. Then, the Commission began rulemaking to make more efficient use of what the Commission (and others) perceived as an inefficient under utilization of portions of the spectrum allocated to the ITFS use since 1963. ITFS was established in 1963 to enable educational institutions to transmit instructional and cultural materials to their students enrolled at certain receiving sites.[18] It concluded this major ITFS rulemaking in 1983 by shifting eight channels in each market formerly reserved (but largely unused) for ITFS use to the Multipoint Distribution Service (MDS) (largely a commercial subscription television-type service).[19]

In order to provide existing and future ITFS licensees using the remaining ITFS channels with an additional source of revenue and to make full use of the ITFS frequencies, which usually remained unused by the ITFS licensees after the end of a school day, the commission established regulations permitting resale of this excess capacity, on the condition that ITFS licensees maintain essential ITFS use of each of their channels. The Commission ensures that essential ITFS use is made by an ITFS licensee of each of its channels by requiring it to show it is providing formal education, specifically by (a) requiring a licensee which does not list schools as receiving sites (of the ITFS transmissions) to furnish detailed information (and verifying documents) about the essential use of its system, naming the schools and degrees or diplomas for which the formal programming will be offered, and describing the administration of the courses, (b) requiring a licensee that distributes only to cable headends to provide the information described in (a) above, if they do not distribute to schools with cable headends or, if they do distribute to schools, to list those, and (c) requiring health care facility ITFS licensees to describe and document the medical science training offered to their staff as training for state licenses.

If an ITFS licensee makes essential use of its station for educational purposes, it may lease the use of one or more of its channels during time periods in which the licensee does not transmit its own educational materials (termed leasing excess capacity). To further ensure, beyond the essential use requirement, that ITFS channels are not used only by commercial MDS operators (or others), ITFS licensees must use each of their channels substantially for ITFS uses before that channel may be leased. Substantial use is defined as at least twenty hours per week of actual

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[18] *See* Educational Television v. FCC, 39 F.C.C. 846, 852-54 (1963).

[19] *See* ITFS Report and Order, 94 F.C.C.2d 1203 (1983).

ITFS use on each channel, and the reservation for future use (by contractual arrangement with lessees of excess capacity) of at least twenty hours more of ITFS use on each channel (so that a total of forty hours per week is definitely dedicated to ITFS use).[20]

To be eligible to apply for an ITFS license, an applicant must be a school or other entity (such as a diocese) engaged in formal education, or must serve such an organization.[21] Additionally, local entities are favored over non-local, national organizations. An educational entity created by affiliated educational institutions (such as a hospital) will be considered "local" in those areas where the member institution is actually located. A college is considered local where it has campuses and in the suburbs where its off-campus students reside.

III. CABLE TELEVISION

The Court of Appeals for the District of Columbia Circuit has invalidated as violative of cable systems' First Amendment rights the Commission's second attempt to develop must-carry rules (regulations which require cable television systems to set aside enough channels to retransmit local television station signals).[22] The Court held that the FCC had not met its burden under *United States v. O'Brien*,[23] in that it had failed to establish that the rules were necessary to advance any substantial governmental interest so as to justify an incidental infringement of cable systems' right to speak. The FCC attempted to justify the rules by asserting that must-carry rules were needed to guarantee viewer access to local broadcast stations during the next few years when viewers could become accustomed to using an input-output switch to gain direct access to over-the-air television signals, rather than relying on their cable operator to provide them. The other aspects of the rules were upheld, however. They include the requirement that cable operators provide customers with an A/B switch, the mechanism which, when connected to a roof-top, attic or television-top antenna, enables the viewer to switch between cable-delivered and over-the-air television. The consumer education rules were also upheld; these require cable operators to inform consumers as to how the A/B switches work, list the television stations the system is not carrying, and provide the name and telephone number of the system contact.

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[20] *See* Instructional Television Fixed Serv. v. FCC, 59 R.R.2d 1355, 1376-77 (1986).
[21] 47 C.F.R. § 74.932(a) (1988).
[22] Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).
[23] 391 U.S. 367 (1968).